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“Adjusting to *Crawford*: High Court Decision Restores Confrontation Clause Protection”

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In *Crawford v. Washington*, 124 S. Ct. 1354 (2004), the U.S. Supreme Court radically transformed its doctrine governing the Confrontation Clause of the Sixth Amendment to the U.S. Constitution. *Crawford* is a very positive development, restoring to its central position one of the basic protections of the common law system of criminal justice. But the decision leaves many open questions, and all lawyers involved in the criminal justice process will have to adjust to the new regime that it creates.

This article outlines and summarizes the problems with the law as it stood before *Crawford*. It then explains the theoretical basis for *Crawford*; and shows how the case has altered prior law in some respects and in others left matters as they were beforehand. Finally, it discusses some of the important questions that are likely to arise under *Crawford* and some changes in law that-- for better or worse--might be adopted in response to the decision.

The Roberts framework and its inadequacies

The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." It has generally been understood that this clause renders unconstitutional the introduction against a criminal defendant of some hearsay, but that a construction under which the clause would render inadmissible all hearsay would be impractical. Before *Crawford*, the basic framework for addressing this issue was the one laid out in *Ohio v. Roberts*, 448 U.S. 56 (1980), and modified by later cases.

Under *Roberts*, any hearsay statement made by an out-of-court declarant and offered against a criminal defendant posed a confrontation issue, but could nevertheless be admitted if it satisfied certain conditions. The primary condition to be satisfied was that the statement be reliable. A statement would be deemed reliable if it either fit within a "firmly rooted hearsay exception" or was supported by "particularized guarantees of trustworthiness." Another condition for admissibility in some circumstances was that the declarant had to be unavailable at trial.

All three of these elements proved to be troublesome. The scope of the Roberts doctrine was too broad. The Confrontation Clause says nothing about hearsay, and many statements that fit within the basic definition of hearsay-- out-of-court statements offered to prove the truth of what they assert--do not plausibly threaten to violate the right of a defendant "to be confronted with the witnesses against him." The overbreadth of the doctrine inevitably required that it be riddled with exceptions and limitations, and this meant that the principle underlying the Confrontation Clause was badly obscured.

In addition, reliability is a poor criterion--unmanageable and inappropriate for the Confrontation Clause. Trials are not supposed to be limited to reliable evidence. Much of the evidence that is admitted--including a good deal of testimony that has been subjected to cross-examination--is highly unreliable. The function of the trial is to give the fact finder an opportunity to make its best assessment of the facts after considering all the evidence properly presented to it, reliable and unreliable. Moreover, the hearsay exceptions do not all do a good job of sorting out reliable from unreliable evidence. A great deal of mundane hearsay raises no strong grounds for doubt, and yet does not fit within an exception. Conversely, much hearsay is plainly of dubious trustworthiness even though it fits within a well-established exception. For example, the idea that the dying declaration exception is justified because no one about to meet his or her "Maker" would do so with a lie upon his or her lips is nearly laughable--and it is not made less so by the Supreme Court's pious assertion in 1990 that this rationale for the exception is so powerful that cross-examination of the declarant would be of "marginal utility." (*Idaho v. Wright*, 497 U.S. 805, 820 (1990).) Further, though a statement might appear to fit within a firmly rooted exception, at least in the view of the forum state, admission could yet be intolerable. Consider *Lee v. Illinois*, 476 U.S. 830 (1986). There, the statement at issue was a confession by one Thomas, according to which both he and Lee played central roles in a gruesome double murder. Thomas was deemed unavailable at Lee's trial, by reason of privilege, and so the state offered the confession, contending reasonably that it was a declaration against interest. The Court's response, that such a categorization "defines too large a class for meaningful Confrontation Clause analysis," *id.* at 544 n.5, was buried in a footnote, perhaps because the Court could not easily reconcile that response with its attempt in *Roberts* to make dispositive the broad categorizations of hearsay law.

If a statement was not deemed to fit within a firmly rooted hearsay exception, it could yet satisfy the "particularized guarantees of trustworthiness" test, and indeed after *Lee* this became the basis for states to seek admission of a statement that was made to investigating authorities by a confederate of the accused and that pointed a finger at the accused; this was the pattern of *Lilly v. Virginia*, 527 U.S. 116 (1999), and of *Crawford* itself. The Court tried to put some order on this case-by-case inquiry by insisting that corroborating evidence could not satisfy it; only "circumstances ... that surround the making of the statement and that render the declarant particularly worthy of belief" could be used. (*Idaho*, 497 U.S. at 819.) This limitation perplexed the lower courts, which strained mightily against it. Furthermore, the "particularized guarantees" test was notoriously amorphous and manipulable. As the Court pointed out in *Crawford*,

Whether a statement is deemed reliable depends heavily on which factors the judge

considers and how much weight he accords each of them. Some courts wind up attaching the same significance to opposite facts. For example, the Colorado Supreme Court held a statement more reliable because its inculcation of the defendant was "detailed," while the Fourth Circuit found a statement more reliable because the portion implicating another was "fleeing." The Virginia Court of Appeals found a statement more reliable because the witness was in custody and charged with a crime (thus making the statement more obviously against her penal interest), while the Wisconsin Court of Appeals found a statement more reliable because the witness was not in custody and not a suspect. Finally, the Colorado Supreme Court in one case found a statement more reliable because it was given "immediately after" the events at issue, while that same court, in another case, found a statement more reliable because two years had elapsed.

(Crawford, 124 S. Ct. at 1371 (citations omitted).)

Finally, the unavailability requirement proved equally difficult. The Court never applied the requirement beyond the context in which it was first articulated, where the statement at issue fit within the hearsay exception for former testimony. At times, it appeared that this was the only context in which the Court would apply the exception; at times it appeared that the Court might apply the requirement to statements fitting within certain other exceptions (perhaps those for which the Federal Rules of Evidence required unavailability?); but the matter remained unresolved. Even knowledgeable observers expressed confusion: Given that the hearsay exception for former testimony is the only one for which prior cross-examination is required, why should it be the only one, or at best one of the few, as to which unavailability is constitutionally required?

In short, the law of the Confrontation Clause was in a most unsatisfactory state. A few concurring opinions, by Justice Thomas, with Justice Scalia joining, in *White v. Illinois*, 502 U.S. 346 (1992), and by Justices Breyer and Scalia in *Lilly*, suggested the possibility of a radical transformation. In *Crawford* seven Justices converted the suggestion to reality.

Crawford and the adoption of the testimonial approach

Crawford followed the familiar pattern of what I have called station house testimony. Michael Crawford was tried on assault charges arising from a knife fight. His wife Sylvia was present at the incident, but she was deemed unavailable to testify. Accordingly, the prosecution offered a statement that Sylvia made to investigating police officers in the station house the night of the incident and that tended to discredit Michael's contention that he acted in self-defense. Michael objected that introducing this statement violated his confrontation right, but the trial court, and ultimately the Washington Supreme Court, disagreed. The latter court upheld admissibility largely on a basis that several other courts had invoked, though it was dubious under *Roberts*--that Sylvia's statement should be deemed reliable because it "interlocked" in significant part with a confession by Michael himself.

The U.S. Supreme Court reversed unanimously. The Chief Justice and Justice O'Connor would simply have held that Sylvia's statement did not satisfy Roberts. The other seven Justices, in an opinion by Justice Scalia, agreed that various factors, including the fact that Sylvia said her eyes were closed during part of the incident, pointed to the unreliability of her statement. But the majority declined to rest the decision on Roberts. Rather, the Court pointed to these factors, and the fact that nonetheless the Washington courts had concluded that the statement was admissible, as a stark indication of the failure of Roberts. Accepting the proposal made by Crawford, and supported by amici, the Court discarded the Roberts doctrine and adopted instead a "testimonial" approach to the Confrontation Clause.

The essence of the testimonial approach may be grasped by considering Crawford's treatment of the three elements of the Roberts doctrine outlined above.

First, Crawford makes clear that the principal--and perhaps only--focus of the Confrontation Clause is testimonial statements. This proposition is in accord with the text of the Confrontation Clause; the clause speaks of "witnesses," the most natural meaning of which is those who give testimony. A focus on testimonial statements is also in accord with the basic idea that motivated the clause, one that is still crucial to the Anglo-American system: that, in contrast to the procedures of some systems of medieval Europe, prosecution witnesses should give their testimony in the presence of the accused and subject to oral cross-examination. Just what statements are to be considered testimonial is an important question, one that is discussed below and that will undoubtedly be the subject of many cases in coming years; the Court declined to furnish a comprehensive definition. Some sense of the concept may be gathered, however, from the Court's pronouncement that "[s]tatements taken by police officers in the course of interrogations," as Sylvia Crawford's was, are "testimonial under even a narrow standard." (Crawford, 124 S. Ct. at 1364.)

Second, if a statement is testimonial and offered by a prosecutor to prove the truth of what it asserts, it cannot be admitted unless the accused has an opportunity to cross-examine the maker of the statement. No matter how reliable a court may deem the statement to be--either because it fits within a firmly rooted hearsay exception or because of particularized guarantees of trustworthiness--reliability cannot be a substitute for cross-examination.

Third, in contrast to Roberts, under which unavailability had an uncertain role that was difficult to defend, the testimonial approach makes the role of unavailability quite clear and logical. Ordinarily, the opportunity for cross-examination should occur at trial. But if the witness--that is, the maker of the testimonial statement--is unavailable to testify at trial, then cross-examination taken at an earlier proceeding will be acceptable as a second-best substitute.

Thus, the Crawford framework is substantially different from the previous one. And this will mean that the manner in which lawyers and judges talk about confrontation issues will change significantly. But will results in actual cases change?

Matters that remain unchanged

Crawford and amici went to some pains to assure the Supreme Court that adoption of the testimonial approach would alter the results in few, if any, of the Court's own precedents. A considerable number of decisions in the lower courts, however, would come out differently under Crawford. To set the groundwork for understanding the respects in which Crawford alters the doctrinal landscape, and important issues that are likely to arise in courts and before rule makers, it will help to examine first several respects in which Crawford does not change the law.

First, under Crawford as before, a statement does not raise a confrontation issue unless it is offered to prove the truth of a matter that it asserts. This is the rule of *Tennessee v. Street*, 471 U.S. 409, 414 (1985), which Crawford explicitly reaffirms. (Crawford, 124 S. Ct. at 1369 n.9.) In *Street* itself, for example, the defendant contended that his confession was coercively derived from that of an accomplice. The Court ruled unanimously that the prosecution therefore could introduce the accomplice's confession to demonstrate not that it was true but that it was substantially different from the defendant's. That result would be unchanged under Crawford. There may be questions as to how far a prosecutor may take this "not for the truth" argument-- for example, if the prosecutor argues that the statement is being offered as support for the opinion of an expert witness, in some cases that might be considered too thin a veneer--but the basic doctrine remains in place.

Second, many statements that were admissible under *Roberts* will still be admissible under Crawford, though the grounds of decision will be different. The question is not, as some analysts have posed it, whether Crawford preserves given hearsay exceptions. The rule against hearsay and the Confrontation Clause are separate sources of law--and Crawford stops the tendency to meld them. The question in each case is whether the given statement is testimonial, and the fact that a statement fits within a hearsay exception does not alter its status with respect to that question. But one can say that most statements that fit within certain hearsay exceptions are not testimonial. For example, under *Roberts*, business records and conspirator statements were deemed reliable because they fell within "firmly rooted" hearsay exemptions. Under Crawford, almost all such statements will be considered nontestimonial, and therefore the Confrontation Clause will impose little, if any, obstacle to their admissibility.

Third, the rule of *California v. Green*, 399 U.S. 149 (1970), is also preserved. As the Crawford Court summarized the rule, 124 S. Ct. at 1369 n.9, "[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." In my view, the rule is a dubious one. It fails to take into account the serious impairment of the ability to cross-examine that arises when a prior statement of a witness is admitted and the witness does not reassert its substance, effectively walking away from it. (See Richard D. Friedman, *Prior Statements of a Witness: A Nettle Corner of the Hearsay Thicket*, 1995 SUP. CT. REV. 277.) But the Court has shown no inclination to modify the rule--indeed, it was reinforced by

Justice Scalia himself in *United States v. Owens*, 484 U.S. 554 (1988), involving a witness whose severe head injuries destroyed much of his memory--and it now becomes more important than ever for prosecutors. If a witness makes a statement favorable to a prosecutor but the prosecutor is afraid that the witness will not stand by the statement at trial, the prosecutor should not argue that the statement is reliable. Rather, the prosecutor should bring the witness to trial, or otherwise ensure that the defendant has had an adequate opportunity for cross. If the witness reaffirms the substance of the prior statement, all well and good for the prosecutor. If the testimony is at variance with the prior statement, then the Confrontation Clause does not bar admissibility of the statement.

Fourth, in applying the unavailability requirement to prior testimony under the Roberts regime, the Court developed a body of case law concerning when the prosecution has adequately proven unavailability, and for better or worse that case law, including part of Roberts itself, is left untouched. At argument in *Crawford*, the Chief Justice asked what impact the testimonial approach would have on *Mancusi v. Stubbs*, 408 U.S. 204 (1972), a key case in this line and one in which he wrote the majority opinion. The proper answer is simple: none at all.

Fifth, *Crawford* explicitly preserves the principle that, if the accused's own misconduct prevented him or her from having an adequate opportunity to cross-examine the witness, then the accused should be deemed to have forfeited the confrontation right. (*Crawford*, 124 S. Ct. at 1370.) The right may be forfeited, for example, if the accused murdered or intimidated the witness. The forfeiture principle may take on greater importance under *Crawford*, as explained below.

Sixth, the rule of *Maryland v. Craig*, 497 U.S. 836 (1990), is presumably preserved. In that case, the Court held that, upon a particularized showing that a child witness would be traumatized by having to testify in the presence of the accused, the child may testify in another room with the judge and counsel present but the jury and the accused connected electronically. *Crawford* addresses the question of when confrontation is required; *Craig* addresses the question of what procedures confrontation requires. The two cases can coexist peacefully, and nothing in *Crawford* suggests that *Craig* is placed in doubt. And yet, Justice Scalia dissented bitterly in *Craig*, the categorical nature of his opinion for the *Crawford* majority squares better with his categorical *Craig* dissent than with the looser majority opinion in *Craig* written by Justice O'Connor, and he presumably would welcome the opportunity to overrule *Craig*. Whether he would have the votes is an interesting question. Three members of the *Craig* majority are still on the Court (the Chief Justice and Justice O'Connor, both of whom declined to join the *Crawford* majority, and Justice Kennedy). Apart from Justice Scalia, Justice Stevens, who also dissented in *Craig*, and Justice Thomas would presumably vote to overrule *Craig*. Thus, if the membership of the Court remains unchanged-- it keeps doing so, but presumably it cannot do so indefinitely-- the question would come down to a contest for the votes of Justices Souter, Ginsburg, and Breyer.

Finally, *Crawford* leaves unchanged the rule of *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), that a violation of the confrontation right may be deemed harmless and therefore

not require reversal. (See *Moody v. State*, 2004 WL 546778 (Ga. 2004).)

Now let us focus on the respects in which Crawford does change the law, on questions that it leaves open, and on possible adjustments to existing law that might be adopted in its wake.

Changes and open questions

The basic change. Most fundamentally, Crawford means that when a prosecutor attempts to introduce a testimonial statement made by a declarant who is not a witness at trial, the prosecutor will not be able to argue that the statement should be admitted on the ground that it is reliable. Unless the accused has had the opportunity to confront and cross-examine the declarant, or has forfeited the right to do so, the statement cannot be admitted.

Thus, to take an obvious example, some courts have been willing to admit grand jury testimony given by a witness who is not available at trial, persuading themselves that various factors-- including the facts that the testimony was given under oath--are in the aggregate sufficiently strong "particularized guarantees of trustworthiness" to excuse the absence of an opportunity for cross-examination. Crawford means that this practice must stop. Similarly, station house statements, of the type involved in Crawford itself, and statements made in plea hearings may not be introduced by the prosecution unless either the witness testifies at trial or is unavailable and the accused has had an opportunity to cross-examine. In one Detroit murder case pending on appeal when Crawford was decided, the prosecutor has since confessed error because the conviction depended in part on statements made to a polygraph examiner by a friend of the accused. Consider also *United States v. Saner*, 2004 WL 771160 (S.D. Ind. Apr. 9, 2004), a post-Crawford decision, in which the accused, a bookstore manager, objected to a confession by a competitor, made to a Justice Department lawyer and paralegal, that the two managers had fixed prices. The court properly held that because the accused had not had a chance to cross-examine the competitor, who by then was asserting the Fifth Amendment privilege, Crawford precluded admissibility of the competitor's statement.

The meaning of "testimonial"

The most significant question that arises, of course, is how far the category of "testimonial" statements extends. The Crawford Court said:

Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.

(Id; see also *id.* at 1364. ("Statements taken by police officers in the course of interrogations are ... testimonial under even a narrow standard.").)

So much for the core. The boundaries of the category will have to be marked out by future cases.

Standards. The Court quoted three standards without choosing among them:

- "ex parte in-court testimony or its functional equivalent--that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially";
- "extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions"; and
- "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."

(Id.) (citations omitted)

I believe the third of these is the most useful and accurate. It captures the idea that the Confrontation Clause is meant to prevent the creation of a system in which witnesses can offer their testimony without being subjected to cross-examination. In some cases, under this view, a statement should be considered testimonial even though it was not made to a government official; most obviously, a government investigator may use a private intermediary to procure testimony, see *People v. Sisavath*, 2004 WL 1172880 (Cal. Ct. App. 5th Dist. 2004); but see *People v. Geno*, 2004 WL 893947 (Mich. Ct. App. 2004), or a witness might use an intermediary as an agent for transmitting testimony to court. Thus, a declaration by a dying person identifying his or her killer should be considered testimonial even though the only person who hears it is a private individual; the purpose of the communication is presumably not merely to edify the listener, but rather to pass on to the authorities the victim's identification of the killer, and the understanding of both parties to the communication is that the listener will play his or her role. Similarly, a complainant should not be able to avoid confrontation by passing on information to a private intermediary who effectively runs a testimony-transmission operation--"Make this videotape and I'll pass it on to the proper authorities. You don't even have to take an oath, and after the tape is done you can even leave the state if you want."

More broadly, though some language in *Crawford* emphasizes prosecutorial abuse, I do not believe that participation by government officials--either receipt of the statement as the initial audience of the statement or active procurement of the statement through interrogation--is the essence of what makes a statement testimonial. Unfortunately, *Crawford*'s mention of interrogation has been an excuse for some courts to treat as nontestimonial statements that were made knowingly to the police describing completed crimes but that, for one reason or another, the courts have regarded as not being in response to interrogations. (See *State v. Forrest*, 2004 WL 1091818 (N.C. App. 2004); *Cassidy v. State*, 2004 WL 1114483 (Tex. App. 2004).) The confrontation right was recognized in older systems in which there was no public prosecutor, so that victims or their families prosecuted crimes themselves. The idea behind the confrontation right, in

my view, is that the judicial system cannot try an accused with the aid of testimony by a witness whom the accused has not had a chance to confront. The prosecutor plays no essential role in the violation. Thus, if just before trial a person shoved a written statement under the courthouse door, asserting that the accused committed the crime, that would plainly be testimonial even though no government official played a role in preparing the statement. Indeed, the prosecutor cannot violate the confrontation right; there is nothing wrong with a prosecutor interviewing a witness out of the presence of the accused; it is only when the court admits the witness's statement into evidence that the right is violated. Most testimonial statements, of course, are made to police or prosecutorial officials, and a direct governmental audience makes a statement much easier to characterize as testimonial. But this does not mean that investigative involvement in the creation of the statement is essential for it to be deemed testimonial.

In some cases a problem that is nearly the reverse arises--an investigative official may be seeking to procure evidence, but the declarant may not understand this. I believe that in the usual case, the investigator's anticipation should not alter characterization of the statement; if the declarant does not recognize that he or she is creating evidence, then the nature of what the declarant is doing in making the statement is not testimonial. Thus, a conversation between criminal confederates, with no anticipation of a leak to the authorities, is not ordinarily testimonial. And, if authorities are surreptitiously recording the conversation, that should not change the result. (See *People v. Torres*, 2004 WL 575205 (Cal. App. 5th Dist., not officially published 2004).) On the other hand, investigators probably should not be allowed to disguise their intent gratuitously--that is, not for the purpose of procuring the statement, but for the purpose of defeating the confrontation right.

In any event, many cases will arise, and in a wide variety of circumstances, in which there will be a close question as to whether a statement should be deemed testimonial. I will address here two of the most important recurring types of cases.

Emergency calls. Consider first the example of statements made in calls to 9- 1-1 operators. In recent years, courts have often admitted these statements--most characteristically, by complainants in domestic violence cases-- when the caller has not testified in court. Under *Crawford*, this practice would not be allowed if the statement is deemed testimonial.

The court in one post-*Crawford* case said, "Typically, a woman who calls 9- 1-1 for help because she has just been stabbed or shot is not contemplating being a 'witness' in future legal proceedings; she is usually trying simply to save her own life." (*People v. Moscat*, 2004 WL 615113, 2004 N.Y. Slip 24090 (Crim. Ct. Bronx Co. 2004).) This generalization fits some cases, but not all.

In some cases, the caller does not perceive that she is in immediate danger, and the primary purpose of the call is not to achieve immediate protection, but to initiate investigative and prosecutorial machinery; indeed, often the call occurs a considerable time after the particular episode has closed, and often the caller gives a good deal of

information that is not necessary for immediate intervention but that will help in prosecution. In a broader set of cases, the caller's motives are mixed, but she is fully aware that what she says has potential evidentiary value against the alleged assailant.

Consider, for example, *State v. Davis*, 64 P.3d 661 (Wash. Ct. App. Div. 1 2003), now on review in the Washington Supreme Court (the same court from which Crawford came). The complainant called 9-1-1 and, in response to questions by the operator, said that the defendant had beaten her with his fists and then run out the door, that she had a protection order against him, and why he had been in her house. The complainant did not testify at trial, and the 9-1-1 tape was played. In closing argument, the prosecutor said, "[A]lthough she is not here today to talk to you, she left you something better. She left you her testimony on the day that this happened [T]his shows that the defendant, Adrian Davis, was at her home and assaulted her." Then the prosecutor played the 9-1-1 tape again. (Report of Proceedings, King Cty. Sup. Ct., Sept. 5, 2001, at 55 (emphasis added).)

Cases like *Davis*, which are not uncommon, suggest that this is not the type of problem that should be addressed by broad generalizations of the "typical" case, especially generalizations made without empirical support. Rather, a case-by-case assessment is necessary.

Even if a 9-1-1 call is nothing but an urgent plea for protection, the court should closely scrutinize it. I will repeat here the analysis that Bridget McCormack and I have given:

To the extent the call itself is part of the incident being tried, the fact of the call presumably should be admitted so the prosecution can present a coherent story about the incident. But even in that situation, the need to present a coherent story does not necessarily justify admitting the contents of the call. And even if the circumstances do warrant allowing the prosecution to prove the contents of the call, those contents generally should not be admitted to prove the truth of what they assert. If the contents of the call are probative on some ground other than to prove the truth of the caller's report of what has happened, then admissibility should be limited to such other ground. To the extent that the contents of the call are significant only as the caller's report of what has happened, such a report usually should be considered testimonial.

(Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1243 (2002).)

In some cases, even though the statement is testimonial, it should nevertheless be admitted because the accused should be deemed to have forfeited the confrontation right; more on this below.

Statements by children. Another type of case that will frequently test the limits of the term "testimonial" involves statements by children, typically alleging some kind of abuse. Children's statements raised some of the most difficult questions under *Roberts*, and they will continue to do so under *Crawford*.

When adults report physical or sexual abuse to a police officer, the statement is clearly testimonial. Can a different result be proper when the declarant is a very young child?

At some point, the statement of a very young child may perhaps be considered more like the bark of a bloodhound than like the testimony of an adult human; that is, the child may be reacting to and communicating about what occurred with no sense of the consequences that the communication may have. Arguably, some degree of understanding is necessary before a declarant may be considered a witness. If that is true, the better rule would probably be that a person is not a witness unless he or she understands that the statement, if accepted, is likely to lead to adverse consequences for the person accused. Under this view, children could be witnesses even if they had no real understanding of the legal system; it would be enough to know that telling a police officer about a bad thing that a person did would likely cause that person to be punished.

The moral as well as cognitive development of the child may well be an issue. My colleague Sherman Clark has argued that what drives the confrontation right is a sense of the obligation of an accuser to confront the accused. If he is right--and I believe there is a good deal of force to the argument--then an important question becomes "the level of obligation and responsibility we are willing to put on the shoulders of children." (Sherman J. Clark, *An Accuser-Obligation Approach to the Confrontation Clause*, 81 NEB. L. REV. 1258, 1282 (2003).)

Now assume that the child's statement as described above is testimonial, but vary the hypothetical: The statement is the same, but it is made to the child's mother instead of to a police officer. As I have suggested above, when an adult makes a statement accusing another person of a crime, the statement may be considered testimonial even though it is made to a private individual rather than to the authorities; if the declarant understands that in all probability the listener will pass the statement on, then the listener is being used essentially as an intermediary. But if a child makes such a statement, the situation may be different. Even if a given statement made by a child would be considered testimonial if instead it were made in similar circumstances by an adult or older child, and even if the child is sufficiently mature to be capable of being considered a witness, it may be that the particular statement should not be considered testimonial. If a child in the position of this one would have no idea that the mother would pass the information on to the authorities, arguably the statement is not testimonial. Another view is that the child, without understanding the particulars, presumably expects the mother to visit adverse consequences upon the assailant, and so the child is testifying within his or her ability to do so. And a third view is that differentiating by maturity is inappropriate, and the perspective of a reasonable adult should govern determination of whether a statement is deemed testimonial. (See Sisavath, *supra* (applying to a four-year-old child's statement standard of reasonable expectation of an "objective observer," and rejecting the view that this should be applied by considering "an objective witness in the same category of persons as the actual witness").)

Furthermore, whatever view a court takes on these matters, it might adopt a point suggested above--that an investigator should not be allowed to withhold information

gratuitously, for the purpose not of advancing the investigation but rather of defeating the confrontation right. Assuming this point is accepted, if the investigative nature of the conversation was withheld from the child but it does not appear that doing so was necessary to procure the statement, then the statement should be treated as if it were testimonial.

Plainly, this is an extraordinarily complex and difficult area, and pending further guidance from the Court it will remain very uncertain. (Compare, e.g., *Geno*, supra, with *Snowden v. State*, 2004 WL 719245 (Md. Spec. App. 2004).) Also, as in the case of 9-1-1 callers, forfeiture issues will often arise with respect to child witnesses, for often a child is intimidated into silence.

Opportunity for cross-examination. If the statement is considered testimonial but the witness does not testify at trial, there is a presumptive violation of the confrontation right. There is no violation, however, if the witness is unavailable and the accused had a prior opportunity to cross-examine. A wise prosecutor, aware of the possibility that a key witness may be unavailable, should often take the witness's deposition.

For example, suppose a laboratory report is a critical piece of evidence. In most circumstances, the lab report should probably be considered testimonial. Therefore, the lab technician who made the report should testify at trial if available to do so. If the technician becomes unavailable through no fault of the accused, and the accused has not had an opportunity to cross-examine the technician, then in this view the report could not be introduced. But if the prosecution takes the deposition and the technician becomes unavailable, the prosecutor may use the deposition in lieu of trial testimony.

Thus, Crawford's demand that the accused have an opportunity to cross-examine will presumably increase the appeal of depositions to prosecutors. Some adjustments to the rules may be in order. Federal Rule of Criminal Procedure 15 provides for depositions only in "exceptional circumstances." That seems to be far too stringent a standard, and it should be loosened up considerably. Furthermore, arguably the rules should be changed to allow for a deposition even before charges have been brought. If a deposition is taken very early, obviously there will often be issues as to whether the accused's opportunity to cross-examine was adequate. Did counsel have enough time to prepare? Did counsel know what issues to press, and have the information at hand that would enable the defense to do so effectively? The better approach would not be to assume that an early opportunity was inadequate. Rather, it would be to demand that the defense show some particular reason to believe that the opportunity did not suffice.

One more change might be worth considering. Suppose that instead of taking the witness's deposition, the prosecution announced its intention of using the witness's statement, invited the defense to take the deposition, and promised to ensure the witness's reasonable availability if the defense did demand a deposition. If the defendant did not make the demand and the prosecution offered the statement at trial, would this procedure suffice? Would the defense be deemed to have waived the confrontation right, or would the procedure be considered a violation of a passive right of the accused to do nothing

and "be confronted with the witnesses against him"? We may never know for sure unless the procedure is tried.

Prior statements of a live witness. As noted above, Crawford preserves the rule of *California v. Green* that the Confrontation Clause poses no obstacle to use of the prior statements of a witness who testifies subject to cross-examination at trial. In jurisdictions following the Federal Rules of Evidence and codifications based on them, however, hearsay law does pose an obstacle: Only certain limited categories of prior statements made by a witness are removed by Rule 801(d) from the hearsay bar. Given that Crawford insists on an opportunity for cross-examination at some point, and treats as sufficient an opportunity afforded well after the statement was made (even if the witness is no longer adhering to the substance of the statement), prosecutors may be expected to lobby for expansion of Rule 801(d) to take full advantage of the constitutional leeway, allowing any prior statement of a witness. For reasons suggested above, I believe that would be a bad development. In effect, this is one area in which hearsay law is still being relied upon to do work that the Confrontation Clause should do, and do more completely. The version of Rule 801(d) originally submitted to Congress was considerably looser than the one that Congress eventually adopted. Congress then recognized that ready admissibility of prior statements of witnesses poses a substantial threat to the confrontation right. If the Court will not recognize this fact now, we may hope that the Congress of today, and other rule makers, will.

Forfeiture. The idea that the accused cannot claim the confrontation right if his or her own misconduct prevents the witness from testifying at trial is a very old one. Crawford explicitly reaffirms it, and justifiably so.

Forfeiture often raises difficult issues. If a witness is murdered shortly before he or she was scheduled to testify against the accused, what showing of the accused's involvement does the prosecution have to make? Is it enough, as Federal Rule of Evidence 804(b)(6) provides in the context of the hearsay rule, that the accused acquiesced in the wrongdoing? And how is participation or acquiescence to be determined; is the mere fact that the accused benefited from the murder enough to raise a presumption at least that the accused acquiesced in it?

One other issue, on which Crawford gives little or no guidance, may be expected to become particularly pressing now. Suppose the wrongful act that allegedly rendered the witness unavailable is the same as the act with which the accused is charged. May it nevertheless cause a forfeiture of the confrontation right? For example, suppose the accusation is of child sexual abuse and the prosecution argues that the abuse itself has intimidated the child from testifying in court (though the victim previously made a statement describing it). Or suppose the accusation is of murder, the prosecution contending that the accused struck a fatal blow and that the victim made a statement identifying the accused and then died.

The first reaction of many observers is that in such situations forfeiture would be bizarre. And yet I believe that in some circumstances it is appropriate (see Richard D.

Friedman, *Confrontation and the Definition of Chutzpa*, 31 ISRAEL L. REV. 506 (1997).) In a post-Crawford case, the Supreme Court of Kansas has agreed. (*State v. Meeks*, 2004 WL 867738 (Kans. 2004).)

The objection most frequently made to applying forfeiture in situations of this sort is that it is bootstrapping: The accused is held to have forfeited the confrontation right on the ground that he or she committed the very act on which the trial centers--an act that he or she is accused of committing, but denies committing and is presumed not to have committed. On closer analysis, I do not believe the objection carries weight. The situation is analogous to the one that traditionally and often arises when a defendant is accused of conspiracy charges and the prosecution argues that the hearsay rule poses no bar to admission because the statement was made by a conspirator of the defendant and in support of the conspiracy. The same factual issue may arise as a threshold matter for evidentiary purposes and on the merits for determining guilt, but so what? The issue will likely be decided for the two different purposes by different fact finders--the judge deciding threshold evidentiary matters and the jury determining guilt--and on different factual bases, given that in determining admissibility issues the judge is not constrained by the ordinary rules of evidence. An apparently more difficult question is whether the judge may consider the offered statement itself in determining whether the threshold proposition (in this case, that the accused committed the forfeiting act) is true. As in *Bourjaily v. United States*, 483 U.S. 171 (1987), there is no good reason why the statement, alone among all nonprivileged information, should be excluded from the court's consideration of the threshold issue. (See generally Fed. R. Evid. 104(a).)

The other objection is that presumably the crime was not committed for the purpose of rendering the witness unavailable. (Rule 804(b)(6) includes an intent standard.) But, again, I respond with a shrug. The point of forfeiture doctrine is that the accused has acted wrongfully in a way that is incompatible with maintaining the right. Suppose that an informer makes a statement to the police describing a drug kingpin's illegal activities. But the informer stays undercover and, before the kingpin knows anything about the statement, the two get into a fight over a card game. The kingpin goes to a closet, pulls out a gun, and murders the informer. If the kingpin is tried on drug charges and the prosecution wants to introduce the informer's statement, the kingpin should not succeed in arguing, "But I haven't had a chance to cross-examine him." The appropriate response is, "And whose fault is that? You murdered him."

As interpreted in this way, forfeiture doctrine can solve one of the puzzles of the confrontation right. The Crawford Court noted accurately that the dying declaration exception is the only one commonly applicable to testimonial statements that was well established as of the time the Sixth Amendment was adopted in 1791. The Court then said, with apparently studied ambiguity, "If this exception must be accepted on historical grounds, it is *sui generis*." (Crawford, 124 S. Ct. at 1367 n.6.) It seems highly unlikely that the Court would generally exclude statements that fit within the dying declaration exception, thus achieving a remarkably unappealing evidentiary result that courts have avoided for several hundred years. On the other hand, to admit these statements on the ground suggested by the Court raises problems of its own. It obscures the clarity and

clutters the simplicity of the principle adopted by Crawford, that if a statement is testimonial it cannot be introduced against the accused unless the accused had an opportunity to cross-examine the witness. And it does so on very weak grounds; for as noted above, the rationale generally cited for the dying declaration exception is absurd. A far better resolution would be to recognize that, however the admissibility of dying declarations has usually been defended, it really is best understood as a reflection of the basic principle that if a defendant renders a witness unavailable by wrongful means, the accused cannot complain validly about the witness's absence at trial. That principle also explains, incidentally, why dying declarations in general are not admitted, but only those describing the cause of death, and why death must appear imminent; if it does not, then presumably a deposition would be possible.

Nontestimonial statements. If a statement is deemed not to be testimonial, what then is the impact of the Confrontation Clause? Crawford does not resolve the matter. The theory of the opinion suggests, and the Court explicitly preserves the possibility of, "an approach that exempted such statements from Confrontation Clause scrutiny altogether." (Crawford, 124 S. Ct. at 1374.) But, in an apparent compromise, the Court also indicated that Roberts, or some standard even more flexible, might also be applied in this context. (Id.)

Some post-Crawford courts, having determined that the statements at issue were not testimonial, have gone through the Roberts analysis and--not surprisingly--determined that the statements were admissible. (State v. Rivera, 2003 WL 23341462 (Conn. 2004); People v. Coker, 2004 WL 626855 (Mich. Ct. App. 2004).) It is easy enough to see why a court disposed to admit a statement would follow this approach: If instead the court held that the Confrontation Clause did not apply at all to nontestimonial statements, it might leave itself vulnerable to reversal if a higher court held that Roberts continues to apply to such a statement. So it is prudent to run through the Roberts analysis, which a court can, if it wants to, always find is satisfied (that being one of the problems with Roberts). No terrible harm is done, perhaps, but the process is wasteful because courts will continue to run through it with predictable results. Until a prosecutor is brave enough to press the point, it is doubtful that there will be a clear test in the Supreme Court on the proposition that the Confrontation Clause has no force outside the context of testimonial statements. To preserve that issue for review, a prosecutor would have to decline to support admissibility of a nontestimonial statement on the basis that it is reliable. If, say, the trial court admitted the statement, but the state supreme court held that Roberts still applies in this context and requires exclusion absent a showing of reliability, then the issue could be presented to the U.S. Supreme Court. And perhaps that would be the final end of Roberts.

Conclusion

Plainly, Crawford leaves many very important questions open. In particular, the impact of the opinion may be much different depending upon whether the Supreme Court eventually adopts a relatively broad or relatively narrow understanding of the term "testimonial." But at least the jurisprudence of the Confrontation Clause has been set on

the proper course. This means that the discourse can be rational and candid. Rather than posing and manipulating unanswerable questions as to whether a given statement is sufficiently reliable to warrant admission, the courts will be asking whether admission violates the time-honored and constitutionally protected right of a criminal defendant to insist that witnesses against him or her testify subject to cross-examination. Give credit to the Court for disenthraling itself from a doctrine that had grown familiar, but was utterly unsatisfactory, and for recognizing the essence of the confrontation right.

Sidebar

... [T]housands of federal prosecutors and ... tens of thousands of state prosecutors need answers as to what ... is covered by the new rule. They need them now, not months or years from now. Rules of criminal evidence are applied every day in courts throughout the country, and parties should not be left in the dark

--Chief Justice William H. Rehnquist

On March 8, 2004, the United States Supreme Court did something rare-- overturned one of its fairly recent decisions, *Ohio v. Roberts*, 448 U.S. 56 (1980)--in favor of old English legal principles. This "one-eighty" is a tornado cutting a swath of uncertainty in the criminal justice community.

The case--*Crawford v. Washington*--involved a prosecutor's use of a wife's statement to the police in her husband's trial for assault and attempted murder to refute his self-defense claim. Crawford's wife was barred from testifying directly under Washington State's spousal privilege.

In an opinion authored by Justice Antonin Scalia, the United States Supreme Court reversed Crawford's conviction, holding that the admission of his wife's statement was "testimonial" and its use violated the Sixth Amendment Confrontation Clause.

For the bombshell decision that it is, *Crawford v. Washington* is noteworthy not just for what it said but also for what it didn't say: "We leave for another day any effort to spell out a comprehensive definition of 'testimonial.'" Also unclear is whether the holding may be applied retroactively. Concurring in the result, Chief Justice Rehnquist, joined by Justice Sandra Day O'Connor, criticized Justice Scalia for leaving the scope of Crawford up in the air.

"It thus falls to trial courts to work out the concrete meaning of *Crawford*, at least in the short term," wrote Judge Ethan Greenberg of the Bronx Criminal Court, who held that a domestic violence victim's call to a "9- 1-1" dispatcher was not "testimonial" under Crawford.

Professor Richard D. Friedman of the University of Michigan Law School has long advocated the "testimonial" approach that Justice Scalia embraced. In *Crawford* he submitted an amicus brief on behalf of eight other law professors and himself, and he was

second chair to petitioner's counsel, Jeffrey Fisher, at the argument in the Supreme Court. Here, he provides a thoughtful analysis and some guidance. We are pleased to present this to our readers.

--Richard Alan Ginkowski, Criminal Justice Editorial Board Member

¹ **Richard D. Friedman** is the Ralph W. Aigler Professor of Law at the University of Michigan School of Law. He dedicates this article to "the blessed memory of my father, whose delight over the Crawford decision had absolutely nothing to do with its implications for the administration of criminal justice."